Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1995

SOLAH KASSEM ABOU-KASSEM,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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32 pp

QUESTIONS PRESENTED

1. Abou-Kassem was found guilty of certain offenses by the jury, after which the court committed him for treatment of his mental illness. He remained incarcerated for treatment at a Federal Medical Facility for approximately seven years before being finally sentenced by the lower court. During this time he filed several motions pursuant to 28 U.S.C. §2255, one of which claimed he was being denied his right of appeal. The counsel assisted motion was denied by the District Court and appealed, which appeal was consolidated with the present case by the Fifth Circuit. Thereafter, the court of appeals ruled that Abou-Kassem could have appealed in 1987 because the case was sufficiently final to do so.

Is the court of appeals ruling contrary to accepted law of finality for purposes of appeal? If not, does not due process require that Abou-Kassem be notified of his right to appeal at the time of commitment, or at least at the time of denial of his 28 U.S.C. §2255 motion?

Does not due process further require that, when a defendant has been committed for mental treatment before final sentencing, an attorney ad litem or guardian ad litem be appointed to make sure that his legal rights are protected?

2. Abou-Kassem attempted to elicit an opinion from both a government psychiatrist and a government psychologist, who had been qualified as expert witnesses, on the ultimate issue of his insanity at the time of the offense. The lower court refused to allow such testimony before the jury based upon Rule 704(b) of the Federal Rules of Evidence.

Does Rule 704(b) operate in such a case to deny Abou-Kassem his constitutional right to call witnesses in his defense and

to cross-examine the witnesses against him.

3. Abou-Kassem was arrested in January, 1987. Abou-Kassem's trial began in November 1987, and concluded with final judgment and sentencing in November, 1994. Between these dates he was committed for treatment of mental illness.

Has Abou-Kassem been denied his right to due process of law under the Fifth and Fourteenth Amendments to the United states Constitution? Has Abou-Kassem been denied his right to a speedy trial under the Sixth Amendment to the United States Constitution?

4. The testimony of government psychiatric experts was considered by the court to determine competency to stand trial and the same expert testimony was considered after trial to determine need for further treatment..

Does the use of different standards at different points of the criminal trial, for determining whether the mental condition of Abou-Kassem is cause for abatement of further proceedings, deny Abou-Kassem due process of law or deny him the equal protection of the law?

5. Does the prescription of anti-psychotic medication by government doctors, coupled with use by Abou-Kassem during trial, void the determination of the jury as to sanity, because the jury is prevented from observing firsthand the psychotic nature of Abou-Kassem without such medication, thus denying Abou-Kassem due process by law?

Further, does not such procedure effectively prevent Abou-Kassem form calling himself as a witness and presenting himself as Exhibit A on the question of sanity?

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PETITION FOR WRIT OF CERTIORARI

Solah Kassem Abou-Kassem ("Abou-Kassem") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 7, 1996, in order to review the constitutionality of a Federal Rule of Evidence and to resolve a conflict between the Fifth and Eleventh Circuit Courts of Appeals.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to this petition is published. It is reprinted in Appendix A hereto ("App.A") at Page A-1. The opinion was filed March 7, 1996.

JURISDICTION

Pursuant to 28 U.S.C. §1254 and Supreme Court Rule 13.1, this petition has been filed within 90 days of the filing of the Court of Appeals opinion.

STATUES INVOLVED IN THIS CASE

Federal Rule of Evidence 704, adopted pursuant to 28 U.S.C. §2072 and 2074, at the time of trial, provided as follows:

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided

by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

18 U.S.C. §4244 provides as follows:

§4244. Hospitalization of a convicted person suffering from mental disease or defect

(a) Motion to determine present mental condition of convicted defendant.-A defendant found guilty of an offense, or the attorney for the Government, may, within ten days after the defendant is found guilty, and prior to the time the defendant is sentenced, file a motion for a hearing on the present mental condition of the defendant if the motion is supported by substantial information indicating that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility. The court shall grant the motion, or at any time prior to the sentencing of the defendant shall order such a hearing on its own motion, if it is of the opinion that there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility.

(b) Psychiatric or psychological examination and report.-Prior to the date of the hearing, the court may order that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c). In addition to the information required to be included in the psychiatric or psychological report pursuant to the provisions of section

4247(c), if the report includes an opinion by the examiners that the defendant is presently suffering from a mental disease or defect but that it is not such as to require his custody for care or treatment in a suitable facility, the report shall also include an opinion by the examiner concerning the sentencing alternatives that could best accord the defendant the kind of treatment he does need.

(c) Hearing.-The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and disposition.-If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect and that he should, in lieu of being sentenced to imprisonment, be committed to a suitable facility for care or treatment, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for care or treatment in a suitable facility. Such a commitment constitutes a provisional sentence of imprisonment to the maximum terms authorized by law for the offense for which the defendant was found guilty.

(e) Discharge.-When the director of the facility in which the defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered from his mental disease or defect to such an extent that he is no longer in need of custody for care or treatment in such a facility, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. If, at the time of the filing of the certificate, the provisional sentence imposed pursuant to subsection (d) has not expired, the court shall proceed finally to sentencing and may modify the provisional sentence.

STATEMENT OF THE CASE

Defendant was initially charged by complaint on January 7, 1987 with the offense of hostage taking in violation of 18 U.S.C. 1203, and certain other offenses related to the course of conduct giving rise to the principal charge.

Defendant pleaded not guilty by reason of insanity, was found competent, and was tried by jury. At trial, Defendant attempted to elicit the opinion of experts employed by the United States government, who had been appointed by the court to examine him, on the ultimate issue of his sanity at the time of the offense. The court refused to allow such testimony, and Defendant was found guilty by the jury of all counts charged. One of these experts testified as to medication prescribed for Abou-Kassem and that he assumed Abou-Kassem was still on this medication during trial.

Prior to sentencing, defendant's court appointed counsel filed a motion pursuant to 18 U.S.C. Section 4244, and upon hearing, the court determined the issue substantially upon only the expert testimony previously offered at the trial before the jury. After taking judicial notice of such previous testimony, the court concluded that defendant suffered from a mental disease for which he was in need of treatment.

The diagnosis considered by the court was Schizophrenia-paranoia type. Among the symptoms Abou-Kassem exhibited were:

Auditory hallucinations of voices and sounds like a welding in his head; that he had a CB system and an alarm system in his head; that the FBI and the DWI were out to kill him and had shot at him on four separate occasions; that munchkins were

jumping on his back and beating him on the head; that the voices told him to cut his own heart out and that he had a treatment for AIDS.

Defendant was committed to treatment under 18 U.S.C. §4244(d) which, by the wording of the statute, constituted a "provisional sentence", to the maximum for each count upon which the jury found him guilty.

Defendant was incarcerated in a Federal Medical Center for treatment from December, 1987, until being returned to court for sentencing on November 1, 1994, a period of almost seven years.

During his seven years of commitment, Defendant filed several pro se and one counsel assisted motions under 28 U. S. C. §2255. Appeal was taken from the court's denial of the counsel assisted motion, and the Fifth Circuit consolidated such appeal with the present one by order dated March 31, 1995 and attached as Appendix B and found at page B-1.

At the sentencing hearing, the court heard evidence and argument of counsel, and dismissed Counts 2,4,7,8, and 9 of the Indictment upon which the jury had returned a verdict of guilty, upon which he had been "provisionally sentenced" and punished, and assessed final punishment on the remaining counts to a term of imprisonment which was less than the maximum authorized under the statutes.

Defendant was only then admonished of his right to appeal by the court, which he promptly exercised.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's Opinion Regarding Finality For Purposes Of Appeal Directly Conflicts With The Eleventh Circuit's Opinion In Muther.

The United States Court of Appeals for the Eleventh Circuit, in U. S. v. Muther, 912 F.2d 1371 (11th Cir. 1990), held that a statute similar to the one at bar did not produce a judgement which was sufficiently final for purposes of appeal, while the Fifth Circuit has here determined that Defendant had the option of appealing at the time of the commitment, or seven years later at the time of final sentencing, or at both such times.

This decision flies in the face of the one final judgment rule, and is in direct conflict with the Eleventh Circuit opinion.

This court, in Flanagan v. U.S., 465 US 259, 104 S.Ct. 1051, 79 L.Ed. 2d 288, (1984), held that the final judgment rule prohibits appellate review until conviction and imposition of sentence. This rule was reaffirmed in Midland Asphalt Corporation v. U.S., 489 US 794, 109 S.Ct. 1494, 103 L.Ed. 2d 879 (1989), also reaffirming the proposition that, until the litigation has ended on the merits and there is nothing left for the court to do but execute the judgment, there is not a final judgment, and appeal does not lie.

In the present case, clearly the sentencing hearing in 1994 and dismissal of certain counts demonstrate that there were merits to be considered and matters left to do.

II. Defendant Has Been Denied the Right Of Compulsory Process For Obtaining Witnesses In His Favor Under The Sixth Amendment To The United States Constitution.

A psychiatrist and a psychologist employed by the government were appointed by the court to examine defendant and gave testimony on the questions of defendant's competency to stand trial and upon his insanity.

Whose witnesses are these?

One must either take the position that they are the government's the defendant's witnesses.

If they are the government's witnesses, the refusal of the

court to let them give their opinions on the ultimate issue of defendant's sanity at the time of the alleged offense, pursuant to Federal Rule of Evidence 704(b), denies defendant the his constitutional right to cross-examine the witnesses.

If they are the defendant's witnesses, then the operation of the rule denies defendant his constitutional right to call witnesses in his defense. Even the avowed purpose of the rule, which is to prevent swearing matches between government and defense experts, fails when the witnesses are the government's own experts, who happened to be called by the defense to testify.

This Court, in Washington v. Texas, 388 US 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019, ruled that preventing defense witnesses from testifying who were physically and mentally capable of testifying, and whose testimony would have been relevant and material to the defense, was a violation of the constitutional right of compulsory process.

To prevent experts from giving their opinion on the ultimate issue only in criminal cases in which the accused's sanity is in issue, and where the expert would otherwise be qualified to testify to such opinion in any other type of case, violates Abou-Kassem's right of compulsory process.

This is particularly true when the reason for the rule has failed. In this case there was no "battle of the experts". Indeed these experts were the government's own, and had most often testified for the government in their previous experience.

III. Defendant Has Been Denied The Right Of A Speedy Trial Under The Sixth Amendment To The United States Constitution.

Given Abou-Kassem's mental condition, the fact that he was never advised by the court of his right to appeal until 1994, and the fact that this court appointed attorney undertook no appeal, and the state of the law in 1987, it is no wonder that speedy trial violations were not properly raised until he filed his

counsel assisted 28 U.S.C. §2255 motion in 1992.

This motion was denied by the District Court. The denial was appealed to the Fifth Circuit and that appeal was consolidated with the appeal of the entire case when the same proceeded to final sentencing in late 1994.

It should be noted that the district court received evidence at the sentencing hearing in 1994 and did in fact sentence Abou-Kassem to less than the maximum provided for each offense of which he was convicted, and did in fact dismiss certain counts upon which Abou-Kassem had been convicted, proceeding in a manner much as if the jury had just returned the verdict the day before, as opposed to seven years before.

IV. Defendant Has Been Denied Due Process Under the Fifth Amendment.

While there is no constitutional right to appeal, where the state gives such a right, inordinate and unexcused delays in post-trial or post-conviction proceedings may constitute a violation of the defendant's rights to due process. "Due process can be denied by any substantial retardation of the appellate process." Rheuark v. Shaw, 628 F.2nd 297, 302, (5th Cir. 1980) cert. Denied 450 U.S. 931, 101 S. Ct. 1392, 67 L.Ed.2nd 365 (1981)

It was not until Abou-Kassem forced the issue with his appeal on the 28 U.S.C. §2255 motion that the government finally decided he was sufficiently well to return to court for sentencing. Abou-Kassem contends that the seven year delay constitutes a "substantial retardation" of the appellate process.

Note that the Fifth Circuit does not rule that Abou-Kassem could have appealed his case at any time he wished to, but rather only at the conclusion of jury trial in 1987, a small window of opportunity during which he had already been committed for mental treatment, or in 1994, when he was finally sentenced.

This procedure allows the government to lock mental patients away in medical centers several states away from the court in which their trial took place, forcefully medicate and sedate them, effectively deny them counsel during their window of opportunity for appeal, because of the distance involved, and five years later, tell them "Well you could have appealed, but didn't. Now you have to wait until you are well and final sentence is imposed before you can appeal." In essence, Abou-Kassem was well enough to undergo jury trial, but not well enough to prosecute an appeal.

V. The Use Of A Different Standard Before Trial To Determine Competency From That Used After Trial And Conviction To Determine The Need For Further Treatment Violates Defendant's Right To Equal Protection Of Laws And To Due Process Of The Law.

The transcript of the previous psychiatric testimony was the only evidence considered by the court in committing the defendant for treatment under 18 U.S.C. §§ 4244.

The court, pursuant to its application of the statutes is in effect saying to the Defendant "You are competent to stand trial before a jury, facing all the rigors and stresses that imposes, but not competent enough be sentenced, to go into the general prison population, or to comprehend your sentence." It is a procedure akin to prosecuting to criminal conviction a child of eleven as if an adult, but then telling the child he cannot be sentenced for seven years because he is a child, that he will just have to stay locked up until he reaches eighteen. At the age of sixteen, the court then tells the child, "Oh, by the way, you could have appealed five years ago, but we forgot to tell you and did not see fit to appoint a competent adult to advise you of the same. Now, you will just have to wait until another window of opportunity to appeal happens."

Abou-Kassem has been denied equal protection of the law based upon what point the criminal trial reached (before final sentencing).

Further, he has been denied due process because there ceased to be a process of any kind at all.

VI. Prescription Of Anti-Psychotic Medication By Government Doctors to Abou-Kassem During Trial Violates Due Process and Compulsory Process Rights.

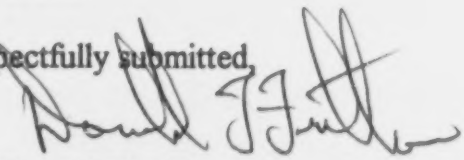
A fair trial by jury cannot be had on the question of insanity at the time of the alleged offense, because the jury is not allowed to observe the psychotic nature of the defendant, unaltered by medication.

Further, such procedures effectively prevent defendant from calling himself as a witness and/or presenting himself as Exhibit A on the question of sanity and comparing that with his condition at the time of the alleged offense.

CONCLUSION

For the forgoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX A
UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 94-11046

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

SOLAH KASSEM ABOU-KASSEM,

Defendant-Appellant.

Appeal for the United States District Court for the Northern District of Texas.

Before POLITZ, Chief Judge, and JONES and BENAVIDES, Circuit Judges.

POLITZ, Chief Judge:

Convicted of hostage-taking, 18 U.S. C. § 1203(a); attempted air piracy, 49 U.S.C. § 1472; unlawful possession of a firearm by an undocumented alien, 18 U.S. C. § 922(g)(5); and use of a firearm in crimes of violence, 18 U.S.C.§924 (c)(1), Solah Kassem Abou-Kassem first was sentenced provisionally to

imprisonment for the statutory maximum for the purpose of hospitalization and treatment for a mental condition. Ultimately he was given a final sentence of 65 years imprisonment , with due credit for time served. He appeals his conviction and sentence. For the reasons assigned we affirm.

Background

On January 5, 1987, Abou-Kassem double-parked his vehicle at the American Airline terminal at Dallas-Fort Worth International Airport and rode the AirTrans to the Delta terminal. He went directly to the ticketing area where he physically seized a young boy, pointing a loaded pistol to the child's head. When the child's father reacted, Abou-Kassem fired the pistol into the ceiling and loudly threatened to kill the child. With the child in tow, Abou-Kassem entered the "secured" area of the terminal followed by several security officers responding to an alert. An eight-hour standoff followed during which Abou-Kassem used the child as a shield, kept his pistol pointed at either the child's head or heart, and repeatedly threatened to kill the child, and sometimes himself, unless an airplane was made available and he was assured safe passage to Egypt.

After intensive negotiations between Abou-Kassem and specially-trained officers, the terms for the boy's release were reached, an aircraft was brought into Abou-Kassem's view, and he was given a written assurance by an Immigration official that he would have safe passage to a country of his choice. Abou-Kassem released the child and put his pistol down. As soon as the child reached safety, several officers moved quickly to arrest Abou-Kassem who grabbed his pistol but was subdued before he could fire it.

Abou-Kassem initially was charged by a complaint, promptly followed by a nine-count indictment for hostage-taking, attempted air piracy, unlawful possession of a firearm by an alien, and use of a firearm in a crime of violence. He moved for a medical examination to determine his competency to stand trial.[1] Following a hearing the trial court found him competent to stand trial. At trial Abou-Kassem offered evidence of his mental illness at the time of the offenses and advanced a defense of legal insanity. The court dismissed as duplicitous one attempted air piracy count and one use of a firearm in a crime of violence count. At close of the evidence the court denied a motion for a judgment of acquittal and the jury returned verdicts of guilty on the seven counts submitted to it.[2]

1

18 U.S.C. § 4241 states, in relevant part:

(a) At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant.

(d) If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering form a mental disease or defect rendering him mentally incompetent tot he extent that the is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General.

2

The court dismissed as duplicitous one attempted air piracy count and one use of a firearm in a crime of violence count.

Before sentencing, Abou-Kassem moved for an evaluation of his then-current mental condition. Following a hearing held in accordance with 18 U.S.C. §§ 4244[3] and 4247,[4] the court determined that Abou-Kassem was then suffering from a mental disease and committed him to the custody of the Attorney General for hospitalization in a suitable facility for appropriate care or treatment in lieu of a final sentence. The order constituted a provisional sentence of imprisonment for the statutory maximum period, life plus 40 years.[5] The order directed that upon Abou-Kassem's recovery from his mental impairment he was to be returned to court for final sentencing.

In October 1992, the Warden of the United States

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3 18 U.S.C. § 4244 pertinently provides:

If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect and that he should, in lieu of being sentenced to imprisonment, be committed to a suitable facility for care or treatment, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for care or treatment in a suitable facility. Such a commitment constitutes a provisional sentence of imprisonment to the maximum term authorized by law for the offense for which the defendant was found guilty.

4 Section 4247 sets forth *inter alia*, definitions, the mental health professionals authorized to perform evaluations, and the proper form of the reports.

5 18 U.S.C. § 4244 (d).

Medical Center in Springfield, Missouri submitted to the district court a certificate stating that Abou-Kassem had sufficiently recovered from his mental difficulty and no longer required custody for care and treatment.[6] Abou-Kassem sought a determination of his then-current mental condition and, after a hearing, the court again determined that he suffered from a mental disease or defect requiring confinement for care and treatment and recommitted him for continued hospitalization.

In October 1994 the trial court received a certification that Abou-Kassem had recovered sufficiently from his mental disease or defect so as to permit sentencing. At the sentencing hearing the government moved to dismiss one hostage-taking count and two counts for use of firearm in a crime of violence. As a consequence of concurrent sentences on three of the counts, and a consecutive sentence on the fourth, Abou-Kassem was sentenced to 65 years imprisonment, subject to a credit for time served on the provisional sentences. He timely appealed.[7]

Analysis

a. *Competency to Stand Trial and Hospitalization of Convicted Persons*

[1,2] a person is deemed incompetent "[i]f, after the

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[6] 18 U.S.C. § 4244(e).

[7] Prior to final sentencing Abou-Kassem filed several motions for relief under 28 U.S.C. § 2255. An appeal from the denial of one of those motions previously was consolidated with this appeal. The order consolidating the two appeals was vacated, however, and that appeal was dismissed as moot.

hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense...."[8] One convicted may be committed to the custody of the Attorney General "{i}f, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect and that he should, in lieu of being sentenced to imprisonment, be committed to a suitable facility for care or treatment.... Such a commitment constitutes a provisional sentence of imprisonment to the maximum term authorized by law for the offense for which the defendant was found guilty."[9]

[3] Abou-Kassem maintains that there is a fatal inconsistency between the trial court's *in limine* determination that he was competent to stand trial and its post-verdict, presentencing orders that he was in need of hospitalization for treatment for a mental disease or defect before he could be sentenced. We do not agree. The relevant standards differ. Under section 4241 the court may grant relief from trial if it "finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease of defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to

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[8] 18 U.S.C. § 4241(d); *United States v. Dockins,* 986 F.2d 888 (5th Cir.), cert. Denied, -- U.S. ___, 114 S.Ct. 149, 126 L.Ed2d 111 (1993).

[9] 18 U.S.C., §4244.

assist properly in his defense."[10] Under section 4244 the court may grant relief from sentencing if it "finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect and that he should, in lieu of being sentenced to imprisonment, be committed to a suitable facility for care or treatment." [11] The standard under section 4241 asks more and is significantly more onerous than the relevant test under section 4244.

[4] Abou-Kassem contends that the use of different standards to determine competency to stand trial, and the need for hospitalization pending final sentencing, violates his due process and equal protection rights. He offers neither reasoned explanation nor citation of authority to support the due process complaint and it is deemed abandoned.[12] To establish the equal protection claim Abou-Kassem must demonstrate that similarly situated persons are subject to disparate treatment without a rational basis.[13]

We are not necessarily persuaded that persons competent to stand trial but who suffer from a mental disease or defect at

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18 U.S.C. §4241(d).

11

18 U.S.C. §4244(d).

12

See United States v. Heacock, 31 F.3d 249 (5th Cir. 1994).

13

Untied States v. Roberts, 915 F.2d 889 (4th Cir.1990) *cert. denied,* 498 U.S. 1122, 111 S.Ct. 1079, 112 L.#d 2d 1184 (1991).

time of sentencing are similarly situated.[14] Were we to assume, *per arguendo*, that they were similarly situated, what appears to be disparate treatment would be supported by legitimate governmental interests. We refer to the governmental interests in: (1) protecting mentally ill prisoners who might be at substantial risk if placed in the general prison population; (2) ensuring the safety of other inmates; and (3) providing humanitarian treatment for mentally ill inmates.

B. *Insanity Defense*

[5] Abou-Kassem claims error in the denial of his motion for judgment of acquittal, contending that he established by clear and convincing evidence that he suffered from a severe mental disease at the time of the offenses. a person is legally insane if "as a result of a severe mental disease or defect, [he] was unable to appreciate the nature and quality or the wrongfulness of his acts. [Otherwise a m]ental disease or defect does not... constitute a defense."[15]

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[14] *Id.* at 891-92 (emphasis in original)("Those defendants subject to §§4244... and 4241 (which refers to persons incompetent to stand trial) are not similarly situated. Section 4241 applies to defendants found to be mentally *incompetent* to stand trial. Section 4244 applies to competent persons found to be suffering from a mental disease prior to sentencing... Clearly those statutes apply to different types of m mentally ill patients who cannot be lumped together into a group consisting of people with mental problems facing federal prosecution").

[15] 18 U.S.C. § 17.

[6-8] We review the denial of a motion for judgment of acquittal based on insanity in the light most favorable to the government. Insanity is an affirmative defense for which the defendant bears the burden of proof.[16] Accordingly we may reject the jury's finding on his issue "only if no reasonable trier of fact could have failed to find that the defendant's criminal insanity at the time of the offense was established by clear and convincing evidence."[17]

[9] Abou-Kassem presented evidence of his mental condition, including the testimony of family members, friends, and two doctors, both of whom testified that Abou-Kassem suffered form paranoid schizophrenia. They further testified that persons so afflicted experience, *inter alia,* delusions, auditory and visual hallucinations, and skewed thought processes. Notwithstanding this evidence, a reasonable trier of fact could have determined that Abou-Kassem failed to prove by clear and convincing evidence that he was unable to appreciate the nature and quality of the wrongfulness of his acts. We perceive no error.[18]

C. *Constitutionality and Application of Rule 704(b)*

16

United States v. Barton, 992 F.2d 66 (5th Cir. 1993); 18 U.S.C. § 17.

17

Id. at 68-68.

18

Abou-Kassem contends that because the government did not offer any rebuttal evidence or contrary expert opinions, the evidence conclusively shows that he was legally insane at the time of the offense. Abou-Kassem had the burden of proof; the government was not required to offer rebuttal evidence or contrary expert opinions. *Id.*

[10] Abou-Kassem maintains that federal Rule of Evidence 704(b) is unconstitutional and that it was applied improperly. Specifically he claims the court should have allowed the expert witnesses to testify whether he was legally insane at the time of the offense.

Rule 704(b) provides that"

No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

[11] We agree with our colleagues in the Tenth Circuit that Rule 704(b) violates neither due process nor equal protection.[19] We review the district court's application of Rule 704(b) for abuse of discretion.[20] The defense experts were permitted to testify about Abou-Kassem's mental disease as well as the characteristics and symptoms thereof. He complains that the experts were not permitted to testify specifically about whether he was "sane" at the time of the offense. That testimony was barred by Rule 704(b). The district court did not abuse its discretion in so ruling.

D. *Forced Medication*

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United States v. Austin, 981 F.2d 1163 (10th Cir.1992), *cert. denied*, 507 U.C. 1035, 113 S.Ct. 1859, 123 L.Ed. 2d 481 (1993).

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United States v. Masat, 896 F. 2d 88 (5thCir. 1990).

Abou-Kassem claims that he was denied due process because he was sedated forcefully from the time of his arrest through the time of trial He contends that the medication prevented him from presenting adequately his insanity defense because it made him unable to testify and communicate with his counsel. Abou-Kassem did not raise this issue in the trial court and we review only plain error.[21]

The record reveals that Abou-Kassem was not sedated forcefully but, rather, willingly took the medication for his mental illness. Further, the record is devoid of any indication that he was unable to testify or communicate with his counsel.

E. *Batson Claim*

[12] We next consider whether the prosecution exercised one of its peremptory challenges in a racially motivated manner in violation of *Batson v. Kentucky.*[22] The government states that Abou-Kassem's *Batson* objection was untimely. Before we may proceed further, that threshold barrier must be addresses. a *Batson* objection must be made before the Vanier is dismissed and before commencement of trial.[23] Abou-Kassem raised the

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United States v. Calverley, 37 F.3d 160 (5th Cir. 1994)(*en banc*), *cert. denied,*-- U.S.---, 115 S. Ct. 1266, 131 L.Ed. 2d 145 (1995).

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476 U.S. 79, 106, S. Ct. 1712, 90 L. Ed 2d 69 (1986).

23

*United States v. Romero-Reyna,*867 F.2d 834 (5th Cir. 1989)

Batson objection and moved for mistrial after the Vanier panel was dismisses. The objection was untimely; no relief is warranted.[24]

F. *Right to Speedy Trial*

[13-15] Abou-Kassem maintains that he was denied his sixth amendment right to a speedy trial by the seven-year delay between his conviction and final sentencing. The constitutionally guaranteed right to a speedy trial applies to sentencing.[25] We review sentencing delays under *Barker v. Wingo*[26] for length of delay, prejudice, whether the defendant asserted his right, and the reason for the delay.[27] If a delay is attributable to the defendant, we may consider waiver under the standard waiver doctrine.[28]

, *cert. denied,* 494 U.S. 1084, 110 S.Ct. 1818, 108 L. Ed.2d 948 (1990).

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See United States v. Maseratti, 1 F.3d 330 (5th Cir.1993), *cert. denied—U.S.*----, 114 S.Ct. 1096, 127 L.Ed.3d 409 (1994); *Romero-Reyna.*

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*United States v. Howard,*577 F.2d 269(5th Cir. 1978).

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407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed2d 101(1972).

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Howard.

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Barker.

[16,17] Sentencing was delayed because Abou-Kassem filed, after his conviction, a motion to determine his then-mental condition. Abou-Kassem thus initially waived his entitlement to a speedy sentencing. After he was committed under section 4244 he asserted his right to a speedy sentencing in his 28 U.S.C. § 2255 motion. The *Barker* factors counsel against finding a violation. The hospitalization of a mentally ill prisoner sufficiently supports the delay, as does the lack of prejudice. We again note that he received full credit for the time served under the provisional sentence.

G. *Timing for Appeal*

[18] Finally, Abou-Kassem complains that the commitment process under section 4244 denied him the right to appeal his conviction for approximately seven years. This charge mandates our careful consideration. The essential issue is whether a provisional sentence imposed pursuant to 18 U.S.C. § 4244 is "final," thereby vesting the appellate court with jurisdiction under 28 U.S.C. § 1291. This issue is *res nova* for us.

The Supreme Court has indicated inferentially that a criminal defendant has the right to appeal his conviction after the trial court imposes a provisional sentence under section 4244.[29]

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[29] *See Corey v. United States*. 375 U.S. 169, 84 S.Ct. 298, 11 L.Ed.2d 229 (1963) (the Court held that a defendant may take an appeal from a conviction and sentence imposed pursuant to now-repealed 18 U.S.C. §4205(b) either at the time of the imposition of the first maximum sentence or after completion of the study provided by the statute and imposition of the final

At that point, the litigation should be deemed final as to the "bottom line" question of the guilt of the defendant.[30] On close examination, we find apparent that a provisional sentence under section 4244 has both vital indicia of finality: (1) the defendant has been convicted of the crime(s) charged, and (2) the defendant is committed to the custody of the Attorney General. Were we to accept the opposing view, we would be countenancing the totally unacceptable proposition that a defendant could be incarcerated for many years, as was Abou-Kassem, without a meaningful opportunity to challenge timely the validity of his conviction.[31] This we reject.

[19] We therefore hold that a defendant may appeal the

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sentence by the court); *see also United States v. Donaghe,* 924 F.2d 940 (9th Cir), *cert/ denied,* 502 U.S. 871, 112 S.Ct. 204, 116 L.Ed.2d 163 (1991) (relying on *Corey* the court held that a provisional sentence imposed pursuant to 18 U.S.C. § 3552(b) is appealable). *But see United States v. Muther,* 912 F.2d 1371 (11th cir. 1990)(the court held that a provisional sentence imposed pursuant to 18 U.S.C. § 3552(b) is a non-final order and isnot appealable).

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Corey, 375 U.S. at 174, 84 S.Ct. At 302 (quoting *Heike v. United States,* 217 U.S. 423, 30 S.Ct. 539, 54 L.Ed. 821 (1910)).

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See id. at 173, 84 S.Ct. At 301 (the Court in *Corey* was concerned that precluding an appeal after imposition of the initial sentence could lead to "the imposition of ... a mandatory three- or six-month term of imprisonment before the defendant could file an appeal," a result that "might raise constitutional problems of significant proportions.").

conviction, in accordance with the Federal Rules of Appellate Procedure, after the court imposes a provisional sentence. At that time, the defendant also may appeal the propriety of the provisional sentence. If the defendant does not timely appeal the conviction after imposition of the provisional sentence, an appeal thereof may be taken after imposition of the final sentence, with or without an appeal of the final sentence.[32]

[20,21] Abou-Kassem did not seek an appeal of his conviction after imposition of either provisional sentence. He did, however, raise this issue in his 28 U.S. C. § 2255 motion and herein. In light of today's ruling that he had the right to appeal his conviction after imposition of the provisional sentence. He was not so informed. He was not prejudiced by that failure, however, in light of today's disposition of the merits. We remind and underscore for courts imposing provisional sentences that the defendant must be notified of his/her option to appeal immediately, as described herein, in addition to the standard advice typically given in conjunction with imposition of sentence.

The defendant's convictions and final sentence are AFFIRMED.

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See id. (a defendant can appeal after imposition of the initial or final sentencing).